

**ROBERTSON, Senior Judge**

## STATEMENT OF THE CASE

The defendant-appellant James E. Doss brings this direct appeal from his conviction by a jury of the class D felony of theft and the class A misdemeanor of criminal trespass. Doss also admitted to the habitual offender enhancement.

We affirm.

## ISSUES

Doss states the issues as:

1. The trial court erred in refusing to allow Doss to present testimony from three (3) individuals regarding the statements of the co-defendant.
2. The trial court erred in granting the State's Motion in Limine with regard to testimony concerning the details of a co-defendants plea agreement.

## FACTS

The charges in this case arise from Doss and Isaiah Smith stealing a fireplace mantel from a residence.

Prior to trial the State made an oral motion in limine regarding the testimony of Smith. The parties agreed that Smith could testify that he was charged with burglary, that he plead guilty, and, is serving a sentence. The stipulation also said that Smith could not testify to the length of his sentence and that he could not testify as to the terms of his plea agreement, including the fact that Smith plead guilty to theft and that the burglary charge against him was dismissed.

After the trial commenced and outside of the presence of the jury, Doss advised the court that he wanted to produce three inmate witnesses who would testify that Smith, while in jail, was saying that Doss was unaware that a crime was being committed and

that Smith felt bad that Doss had been charged with a crime when Doss had no knowledge that a crime was being committed. The three inmate witnesses were not included in the trial court's discovery order. The trial court inquired of Doss if their testimony would be consistent with Smith's testimony. Doss said it would, however, the State objected on the grounds that the appropriate witness would be Smith and anything that Smith said to others would be hearsay and not admissible. The trial court held the matter under advisement until after Smith testified.

Smith testified that Doss followed him into the house and then went to the basement to smoke crack while Smith removed the mantle. Smith said that if anyone who saw Doss outside the house and helping move the mantle, it was only because Doss was just helping Smith. Smith also said that Doss, mostly because of his recent smoking crack, had no idea that "nothing" was being stolen.

After Smith testified the trial court held a conference with the attorneys about the testimony of the three inmate witnesses. The trial court ruled that their testimony was hearsay; that the best evidence was Smith's testimony; and, that there were no charges that a recent fabrication occurred. Doss then wanted to recall Smith so he could testify that he did not plead guilty to burglary. After the trial court denied the recall of Smith, Doss then asked the trial court to take judicial notice of the Smith's plea agreement. Doss cited Ind. Evidence Rule 201 as authority for the trial court's taking judicial notice of Smith's plea agreement.

After the close of evidence the jury advised the trial court that it had questions for Smith. Smith was recalled outside of the presence of the jury and testified he plead guilty

to theft and the burglary charges against him had been dismissed. Smith also said he had told others in the jail that he had committed the theft. Doss was rebuffed when he attempted to get this testimony before the jury.

Additional facts will be added as needed.

## DISCUSSION AND DECISION

### Issue 1.

The admissibility of evidence is within the sound discretion of the trial court. *Curley v. State*, 777 N.E. 2d 58, 60 (Ind. Ct App. 2002). We will only reverse a trial court's decision on the admissibility of evidence upon a showing of an abuse of discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.*

The thrust of Doss' argument rests in the federal Constitution's Sixth amendment that bestows the right of a criminal defendant to present witnesses in his own behalf.

Much of the argument on this issue revolves around whether the testimony of the three inmate witnesses is hearsay. When the trial court ruled that the testimony of the three inmate witnesses was hearsay the facts before him were that they would say that Smith said that Doss was not aware that a crime was being committed and that Doss was a victim of the circumstances.

We will only reverse a trial court's hearsay ruling for an abuse of discretion, and we affirm the ruling on any legal basis apparent in the record.

Hearsay is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

When an out-of court statement is challenged as hearsay, we first determine whether the testimony describes an out-of-court statement that asserts a fact susceptible of being true or false. If the statement contains no such assertion, it cannot be hearsay and the objection should be overruled. However, if the statement does contain an assertion of fact, we consider the evidentiary purpose of the proffered statement; if it is to prove the fact asserted, and there are no applicable hearsay exceptions, the statement is inadmissible as hearsay. Lampitok v. State, 817 N.E. 2d 630, 639 (Ind. Ct. App. 2004) (Citations omitted.)

Given the facts before the trial court we conclude that the three inmates proffered testimony constitutes hearsay and there is no error in the denial of Doss' motion to call them as witnesses.

#### Issue 2.

Doss claims trial court error in the granting of the State's motion in limine. The purpose of a motion in limine is to prevent the exposure of potentially prejudicial material to the jury until the trial court has the opportunity to rule on it's admissibility. Willingham v. State, 794 N.E. 2d 1110, 1116 (Ind. Ct. App. 2003). The trial court's ruling on a motion in limine is not a determination of the ultimate admissibility of the evidence. *Id.* If the trial court commits error in admitting evidence that the [party] sought to be excluded by a motion in limine, the error lies in the admission of evidence at trial, not in a violation of the trial court's pretrial ruling. *Id.* There is no error in the trial court's granting the motion in limine.

Doss does not argue the stated issue, but instead argues that it was error for the trial court to not take judicial notice of Smith's plea agreement and that the evidence in that guilty plea is relevant to his defense. The testimony Doss seeks to have the jury hear is that Smith pled guilty to theft, not burglary. In making this argument Doss ignores the

trial court's pre-trial ruling on the State's motion in limine and the stipulation of the parties to the agreement reached therein.

First, we agree with the State's observation that Smith pled guilty to theft, and that Doss was found guilty of theft. Doss apparently was not prejudiced in that he was found guilty of the same offense as Smith, as opposed to Doss' fear of being found guilty of burglary, a higher class offense.

Next, Doss refers to Smith as a co-defendant, a characterization that may not be correct. Smith was tried in a separate proceeding and under a distinct cause number. We are left to wonder if many of Doss' citations of authority on this issue are applicable to Smith's plea agreement in Doss' case.

Nonetheless we believe the issue is settled in that as a general rule, a trial court may not take judicial notice of its own records in another case previously before the court, even on a related subject. See: Bonds v. State, 720 N.E. 2d 1002, 1006 (Ind. 2000). The trial court was not provided any testimony about exceptions to the above rule, or the applicability of Evid. R. 201 to this case.

There was no error in the trial court's granting the motion in limine.

### CONCLUSION

There was no error in the denial of the three inmates witnesses testimony relating to Smith's jail house comments. There was no error in the granting of the State's motion in limine.

Judgment affirmed.

SHARPNACK, J., and RILEY, J., concur.